DEPARTMENT OF STATE REVENUE

04-20150439.LOF

Letter of Findings Number: 04-20150439
Sales/Use Tax
For The 2011, 2012 and 2013 Tax Year

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana car dealership was liable for the sales tax on a vehicle which it sold to an out-of-state purchaser but failed to properly document the delivery to out-of-state location. Dealership has provided sufficient documentation for penalty abatement.

ISSUES

I. Sales/Use Tax - Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-24; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); 45 IAC 2.2-2-1; 45 IAC 2.2-5-53; 45 IAC 2.2-5-54; Sales Tax Information Bulletin 28S (April 2012).

Taxpayer protests the assessment of sales/use tax.

II. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a licensed Indiana car dealership in the business of selling new and used vehicles in Indiana. Taxpayer's customers include residents from states other than Indiana. Taxpayer occasionally delivers vehicles to its customers' residences.

In 2014, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records and tax returns for the tax years 2011, 2012, and 2013. Both Taxpayer and the Department agreed to utilize a statistical sampling method to project the audit results. Pursuant to the audit, the Department determined that Taxpayer sold several vehicles to its customers but failed to collect sales tax on the transactions which were subject to Indiana sales tax. The audit subsequently assessed Taxpayer additional tax, penalty, and interest accordingly.

Taxpayer made a partial payment on a portion of the assessment with which it agreed, but it protested the remainder. An administrative hearing was held. This Letter of Findings results. Further facts will be provided as necessary.

I. Sales/Use Tax - Imposition.

DISCUSSION

During the audit, pursuant to an agreed projection method, the Department sent questionnaires to some

customers inquiring as to the delivery location of the vehicles sold. Based on customers' responses, the audit concluded that certain sales were Indiana retail transactions subject to Indiana sales tax but Taxpayer failed to collect and remit sales tax to Indiana. The audit thus assessed additional tax pursuant to the projection agreement.

Taxpayer, to the contrary, claimed that the Department's assessment is overstated because it was not responsible for the sales tax imposed on a vehicle sold to an out-of-state purchaser in January 2013 because it delivered the vehicle to the purchaser's residence located outside of Indiana.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a); 45 IAC 2.2-2-1. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible person property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." Id. "The retail merchant shall collect the tax as agent for the state." Id.

When a purchaser claims the purchase "is exempt from the state gross retail [] tax[], the purchaser may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(a). The "seller accepting a proper exemption certificate under [IC § 6-2.5-8-8] has no duty to collect or remit the state gross retail [] tax on that purchase." Id. Otherwise, as an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

Additionally, a statute which provides a tax exemption is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). One particular exemption relevant to this present case is a retail transaction that qualifies interstate commerce. IC § 6-2.5-5-24(b); See also 45 IAC 2.2-5-53; 45 IAC 2.2-5-54. Specifically, 45 IAC 2.2-5-54(b), in relevant part, provides that:

> Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.

The Department's Sales Tax Information Bulletin 28S (April 2012), 20120530 Ind. Reg. 045120259NRA ("Information Bulletin 28S"), addresses issues concerning sales of motor vehicles. The Information Bulletin 28S further explains, in relevant part, as follows:

> **IV. INTERSTATE COMMERCE EXEMPTION**
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> A vehicle . . . sold in interstate commerce is not subject to the Indiana sales tax. **To qualify as being "sold in interstate commerce," the vehicle . . . must be physically delivered**, **by the selling dealer to a delivery point outside Indiana**. The delivery may be made by the dealer, or the dealer may hire a third-party carrier. **Terms and the method of delivery must be indicated on the sales invoice**. **The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale**. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier,

> the carrier is acting as an agent for the buyer; thus, the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis is original**) (**Emphasis added**).

Accordingly, a licensed Indiana car dealer generally must either collect sales tax or an exemption certificate at the time of the car sale. To qualify for the interstate commerce exemption, the dealer must document the terms and the method of delivery on the sales invoice and maintain copies of delivery documents to substantiate that the vehicles are sold in interstate commerce. Otherwise, the dealer will be responsible for the Indiana sales tax.

Taxpayer in this instance, throughout the protest, claimed that it was not responsible for a portion of the sales tax imposed. Specifically, Taxpayer explained that one customer who resides in a different state did not understand the Department's letter of inquiry. Referencing its "OUT OF STATE DELIVERY RECEIPT," Taxpayer further asserted that the transaction at issue was exempt because it delivered the car to that customer's residence, a place outside of Indiana.

Upon review, however, Taxpayer's reliance on its supporting documentation is misplaced. Specifically, the "OUT OF STATE DELIVERY RECEIPT" was signed and dated July 2015 by the customer, months after the Department's audit was concluded. The Department audit noted, in relevant part, as follows:

> [Auditor] sent a letter to the purchaser requesting confirmation on where the vehicle was delivered, either at the dealership or out of state. The purchaser returned the letter with both boxes checked stating they licensed it in [the state other than Indiana]. A follow-up letter was sent requesting clarification. The purchaser checked the box that it was picked up at the dealership.

Thus, in the absence of other verifiable documentation, the vehicle at issue is presumed to be sold and picked up at the dealership's Indiana location in 2013. That is, when the purchaser picked up the vehicle at issue at the dealership's business location in Indiana, it was an Indiana retail transaction and subject to Indiana sales tax pursuant to the above mentioned statutes, regulations and case law. In the absence of other verifiable supporting documentation to demonstrate otherwise, the audit properly assessed Taxpayer additional tax because Taxpayer is responsible for the sales tax under IC § 6-2.5-9-3.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration - Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax period in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

> (1) fails to file a return for any of the listed taxes;
> (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
> (3) incurs, upon examination by the department, a deficiency that is due to negligence;
> (4) fails to timely remit any tax held in trust for the state; or
> (5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

45 IAC 15-11-2(b) further states:

> "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as

negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
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> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
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> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Upon review, the Department agrees that in this instance the negligence penalty should be abated. Taxpayer has made reasonable effort to demonstrate that it believed that it was not liable for the tax.

FINDING

Taxpayer's protest of the imposition of negligence penalty is sustained.

SUMMARY

On Issue I, Taxpayer's protest is respectfully denied. As to Issue II, Taxpayer's protest of the imposition of negligence penalty is sustained.

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